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BOARD OF INQUIRY

ORGAN AND BERNSTEIN

VS.

FLETCHER

GRAVENHURST, ONTARIO

R E P O R T

SUBMITTED TO THE

ONTARIO HUMAN RIGHTS COMMISSION

BY

JUDGE L. A. DEZIEL

AUGUST 4, 1966

THE ONTARIO HUMAN RIGHTS CODE, 1961-62
(AS AMENDED)

IN THE MATTER OF complaints by Mr. and Mrs. D. A. Organ and Mr. and Mrs. L. Bernstein, that they were denied occupancy of two summer cottages because of their creed, on or about May 9th, 1966, in Brydon's Bay, near Gravenhurst, by the owner, Mrs. W. A. Fletcher of Gravenhurst, Ontario.

BOARD OF INQUIRY

- His Honour, Judge L. A. Deziel

APPEARANCES:

Charles L. Dubin, Esq., Q.C.,
and Bruce Haines, Esq.,
Counsel for The Ontario Human Rights
Commission.

A. Alan Borovoy, Esq.,
District Labour Committee for Human
Rights

Dr. Daniel G. Hill,
Director of The Ontario Human Rights
Commission

P. B. Stuart, Esq.,
Counsel for Respondent.

To The Ontario Human Rights Commission and to the Honourable H. L. Rowntree, Minister of Labour of the Province of Ontario:

Gentlemen:

Pursuant to my appointment by the Minister of Labour on the 20th day of June, 1966, as a Board of Inquiry under the Human Rights Code of the Province of Ontario, to inquire into the above-cited complaints, I arranged for a hearing to be held on Friday, the 15th day of July, 1966, at the Court House at Bracebridge in the District of Muskoka, Ontario.

It will be useful to review the facts giving rise to the complaints in respect of which the hearing was held, and as I find them to be.

On Sunday, the 8th day of May, 1966, Donald Organ and May Organ, his wife, in company with Leon Bernstein and Rose Bernstein, his wife, met with Mrs. W. A. Fletcher for the purpose of negotiating the rental of summer cottages owned or controlled by Mrs. Fletcher at or near Gravenhurst, Ontario. They were conducted to the cottages by Mrs. Fletcher and were shown at least three of the available cottages in a congenial and friendly atmosphere. Agreement had been reached between the Bernsteins, the Organs and Mrs. Fletcher whereby each of the couples agreed to rent a cottage for the entire summer season of 1966. About the time of the conclusion of the discussions between the parties, Mrs. Fletcher was apprised of the fact, by Mrs. Organ, that both couples were Jewish, and at that point the entire atmosphere, as it related to the rental negotiations, changed materially, and in the language of Mrs. Organ, "Mrs. Fletcher became very cold and didn't have much conversation any more with us. As a matter of fact, it seemed like she was a different person...."

The following day, being the 9th of May, 1966, at or about the hour of eight o'clock in the forenoon, Mrs. Organ accepted a long distance telephone call from a person who identified himself as Mrs. Fletcher's son, and who asked to speak to Mr. Bernstein. The purport of the discussion which ensued was that the cottages which the Bernsteins and the Organs

had agreed to rent, had been rented by him to other persons, which fact was unknown to his mother at the time that the rental agreements were made.

On the same day, Mrs. Organ wrote a letter to Mrs. Fletcher, which was entered as Exhibit 4 at the hearing, expressing her disappointment, and requesting advice if any vacancy should arise. Again on the same day, Mrs. Organ received, by mail, the cheques which had been given to Mrs. Fletcher as deposits on the rental agreements.

On the 12th day of May, Mrs. Doris Lane wrote a letter to Mrs. Fletcher, Exhibit 8, to inquire if she had cottages to rent in the Gravenhurst area, and on the 13th day of May, Mrs. Fletcher phoned Mrs. Lane and advised her that she had three cottages available to rent, two of which were four-bedroom cottages.

On the 13th day of May, Terry Meagher wrote a letter to Mrs. Fletcher, Exhibit 9, to inquire about the availability of Mrs. Fletcher's cottages, and in reply, Meagher received a letter from Mrs. Fletcher, Exhibit 10, dated the 14th of May, advising that she had one three-bedroom cottage, and one four-bedroom cottage available for rent for the season.

On the 28th of May, the Globe and Mail, a newspaper published at the City of Toronto, carried an advertisement, Exhibit 6, which described a cottage similar in almost every detail to the cottage that the Organs had agreed to rent, and the advertisement listed a telephone number in Gravenhurst which was the telephone number Mrs. Fletcher had given to Mrs.

Organ as her telephone number.

At the hearing, Mrs. Fletcher did not testify but relied on the argument that her cottages were not a place to which the public is customarily admitted, and consequently that in her dealings with the cottages she was not subject to the Human Rights Code of the province.

I have no hesitation in finding Donald Organ and his wife, May Organ, and Leon Bernstein and his wife, Rose Bernstein, the complainants in this matter, were in fact denied occupancy of two summer cottages on or about the 9th day of May, 1966, by Mrs. W. A. Fletcher because of their creed.

The question I must now resolve is whether or not Mrs. Fletcher, in her dealings with her cottages, was subject to the Human Rights Code, Statutes of Ontario, 1961-62, as amended.

It seems appropriate to set out the provisions of Part One of the Code which may be relevant.

"1. (1) No person shall publish or display or cause to be published or displayed or permit to be published or displayed any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

(2) Nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject. 1961-62, c.93, s.1.

2. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,



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(a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or

(b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,

because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons, 1961-62, c.93, s.2; 1965, c.85, s.1.

3. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,

(a) deny to any person or class of persons occupancy of any commercial unit or any apartment in any building that contains more than three self-contained dwelling units; or

(b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or any apartment in any building that contains more than three self-contained dwelling units,

because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons, 1961-62, c.93, s.3; 1965, c.85, s.2.

The essence of the complaint against Mrs. Fletcher is that she did, contrary to Section II, either deny or discriminate against the complainants with respect to accommodation in a place to which the public is customarily admitted. The evidence amply demonstrated that Mrs. Fletcher catered to the public through advertising her accommodation in a Toronto newspaper prior to and subsequent to the date of the complaint. At the same time, Mrs. Fletcher's cottages were also licensed

under The Tourist Establishments Act, R.S.O. 1960, Chapter 402, amended S.O. 1964 Chapter 117. Under this Act, "tourist establishment" is defined as follows:

(e) "tourist establishment" means any premises operated to provide sleeping accommodation for the travelling public or sleeping accommodation for the use of the public engaging in recreational activities, and includes the services and facilities in connection with which sleeping accommodation is provided, but does not include,

(i) a camp operated by a charitable organization within the meaning of THE CHARITABLE INSTITUTIONS ACT, or

(ii) a summer camp within the meaning of the regulations made under THE PUBLIC HEALTH ACT, or

(iii) a club owned by its members and operated without profit or gain.

The essential determination is whether or not the accommodation services or facilities provided by Mrs. Fletcher represents a public place. In approaching this question it is respectfully submitted that the observation of Mr. Justice Middleton in Rex v. Clifford (1916) 35 O.L.R. 287, must be carefully considered. The learned Judge stated at page 289:

"the words "place" and "public place", as has been more than once pointed out, are exceedingly elastic, and the meaning must be determined having regard to the context and the purview of the legislation".

Equally suggestive of the elasticity of the expression are the remarks of Chancellor Boyd in Rex v. Leitch (1916) 36 O.L.R. 1, at page 2:

"public place" is a fluctuating term, and the meaning varies with the context..."

That the words "public place" are indeed elastic and vary in

meaning having regard to the context and purview of the legislation is amply borne out by many of the decided cases. Thus, for example, in *Regina v. Dubois* (1953) 106 C.C.C. 150, S. T. Bigelow, Magistrate, had occasion to consider these words in a charge that an accused unlawfully did, being a common prostitute, wander in a public place or street or highway and did not give a satisfactory account of herself. The accused was observed to go directly to a room in a hotel and in due course was followed there by a man. The police entered the hotel room and thereupon laid the charge. The purview or policy of the legislation would appear to be that the public is not to be subjected to a spectacle of solicitation by prostitutes in public view. The legislation was not aimed at prohibiting the conduct in question when it took place within the confines of a room in a hotel. Likewise, under the Liquor Control Act, R.S.O. 1960, Chapter 217, restaurants and hotels, for example, have been held not to be public places for the purposes of the offence of being intoxicated in a public place. The policy or purview of the legislation is not to make all drunkenness an offence but rather to keep those who are intoxicated off public streets, plazas or squares and away from those places universally resorted to as of right by all members of the public.

The purview or policy of legislation may from time to time change as is evidenced by those provisions of the Criminal Code dealing with the unlawfully causing of a disturbance in or near a public place. Recently the definition of "public place" under Section 130 of the Code was changed, and now reads:

"Section 130 (b) "public place" includes any place to which the public has access as of right or by invitation, express or implied;.."

In Regina v. Holhauser (1964) 42 C.R. 276, Salteril P.M. had occasion to consider a charge of unlawfully causing a disturbance in or near a public place. The event giving rise to the charge occurred in a beverage room which under the previous definition in the former Code had been held not to be a "public place". The addition of the words "or by invitation, express or implied" were taken to have brought lounges or beverage rooms within the meaning of "public place" for the purposes of the Criminal Code.

The former cases under the old Code had rested on the concept expressed by Lord Goddard in Brannon v. Peek (1948) 1 K.B. 68-"so far as I know, no person has a right of entering into a public house".

With this background we may therefore approach the issue as to the interpretation to be placed upon the concept - "public Place" - as related to the concept of accommodation, services or facilities in Section II of the Ontario Human Rights Code. That a broad interpretation is indicated seems evident from the preamble from the Code itself. As a vehicle of interpretation, Section 1 of the Code would seem even more germane. That section specifically prohibits the display or publication of any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of race, creed, colour, nationality, ancestry

or place of origin of such person or class of persons. Hence it is obvious that Mrs. Fletcher could not add to her road sign a placard reading - "No Jews allowed", no more than she could suggest in her newspaper advertisements - "Only Aryans need apply".

It is trite law that no one should be able to achieve or carry out indirectly that which the legislation has prohibited directly. Thus, it does not reasonably seem to have been the legislative object and intention to forbid Mrs. Fletcher to discriminate against the public to which she caters by written signs or symbols and yet conduct her business with the public that had at its foundation a forceful but unwritten statement, "I discriminate on the ground of race, colour, creed, etc. as I please".

By the same token, it would not seem that it was the intention or object of the legislation to permit Mrs. Fletcher to cater openly to the public and yet when a certain class of the public applied for accommodation to be then told she could exclude whom she liked and upon whatever basis she desired, since her establishment was "private property". This argument was advanced and dealt with in *Powell v. Utz*, 87 Federal Supplement 811. Here a federal district court had occasion to consider a situation where a Negro couple were discriminated against in a restaurant catering to the public in the State of Washington. The essential question posed before Chief Justice Driver was noted at page 813:

"the question for determination, then, comes

down to this: Is a restaurant a place of public accommodation within the meaning of the above quoted language of the Washington Civil Rights Statute? An apposite decision of the question by the State Supreme Court would of course be binding on this court, but up to this time there has been no such decision."

The form of the legislation in Powell v. Utz was as follows:

"Every person who shall deny to any other person because of race, creed or colour, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation assemblage or amusement, shall be guilty of a misdemeanor."

The argument of counsel for the respondents is evident in the following remarks of Chief Justice Driver on page 813:

"In Goff v. Savage the Court stressed the requirement of a Statute that the establishment must be a "public" one, and reasoned that since one operating a soda fountain has the right to contract or refuse to contract with prospective customers as he sees fit, the business is private, even though the general public is invited to enter the place where the business is carried on. The Court endeavoured to distinguish that kind of place from one such as a theatre where the customer buys an admission ticket. I do not see any sound basis for the distinction. A theatre owner, as well as a soda fountain operator, has the right to select his patrons on a proper individual basis and may decline to serve those who are personally objectionable because of uncleanness, disorderly conduct and alike. The only difference is that as to the theatre, the selection is made at the entrance to the establishment, whereas in the case of a soda fountain, it is exercised after the patron has entered. The Civil Rights Statute does not curtail the right to reject patrons on an individual basis since it applies only where the refusal to serve is because of race, creed or colour."

Chief Justice Driver then went on to deal inferentially with the conclusion that would follow if the ample provisions of

Human Rights legislation were hacked apart by concepts of private property, bearing in mind that by far the vast majority of business premises catering to the public for one reason or another are lodged in private hands. The learned Justice stated at page 815:

"According to the foregoing dictionary definitions, 'public accommodation' clearly includes a restaurant open to the general public. That meaning appears to be in accord with the legislative intent as to the scope of the Statute. It may be assumed that the legislature had some purpose in mind when it included in the Act that the words "public accommodation". If it had intended to limit the operation of the law to places of public amusement or resort where tickets of admission were sold, it could easily have so provided in plain words. If the Statute were to be construed to exclude any business establishment where at common law and in absence of statutory restrictions the proprietor has the right to govern the terms of his dealings with patrons by private contract, then no privately owned and operated place of business would be included, and the Civil Rights Statute would be a farce and a sham. Manifestly, the legislature did not intend to limit the reach of the Act to government owned and operated establishments."

While the American authorities are of course not binding upon this Board of Inquiry, they are of considerable persuasive value bearing in mind that the United States has long been the progenitor of Civil Rights legislation, and the entire area both in Canada and the United States has, until very recently, been completely unknown.

Finally, some observations should be directed to Section III of the Human Rights Code dealing with discrimination in respect of apartment buildings. Mrs. Fletcher cannot shelter under Section III which would appear not to prohibit discrimination

in respect of any apartment in any building that does not contain more than three self-contained dwelling units. The Ontario Human Rights Code was assembled and compiled largely on the basis of drawing from Civil Rights legislation in the United States where special treatment appears to have been given to the "apartment building" as such. This is evident from the decision in Gregory v. Madison Mobile Homes Park Incorporated (1954) 128 N.W. 2d 462. Here an attempt was made to narrow the concept of "public place of accommodation" by having the Court give special treatment to a trailer park in the same fashion that special treatment had been given to apartment buildings. The case was an action for damages because of alleged refusal by a trailer park owner to give space to the applicant because of the applicant's race. The Supreme Court of Wisconsin where Mr. Justice Deitreich rejected the argument that a trailer park was not a public place of accommodation and stated at page 464:

"The appellant contends that in order for a mobile Home Park to be classified as a place of public accommodation, it must be determined that it is similar and of a like kind to inns, restaurants, taverns, barber shops and public conveyances (the facilities specifically named in the Statute). Appellant argues at length as to the dissimilarity between a trailer park and the facilities enumerated in the Statute, stating cases dealing with apartment buildings, hotels, disposition and rental of private real estate, etc. Suffice it to say that these cases-which are all from other States, and not necessarily binding on this court - indicate that hotels and motels are places of public accommodation under the Statute, whereas an apartment building is not".

The American experience has not been prepared to widen the concept of "apartment building" so that other places of public accommodation could shelter under what is in effect the special treatment considered in Civil Rights legislation, of which Section III of The Ontario Act is an example.

On the basis of both the authority in Canada and in the United States, I find that "Fletcher's Cottages" do indeed fall within the definition of Section II of The Ontario Human Rights Code.

During the course of the hearing, I attempted to negotiate a settlement of the dispute on the basis that Mrs. Fletcher sign and deliver an apology to the complainants, that she would abide, in future, by the Human Rights Code, and further that she would offer to rent the cottages which she had refused to rent to the Bernsteins and the Organs for the 1967 season. Mrs. Fletcher refused to consider the proposal on the ground that the cottages in question had been rented for the 1967 season.

I recommend for your consideration that the licence issued to Mrs. Fletcher under the Tourist Establishments Act, be revoked, and that she be prosecuted in accordance with the provisions of the Code.

All of which is respectfully submitted.

(signed) _____
Board of Inquiry

DATED at Windsor, Ontario, this 4th day of
August, 1966.

